Ocean Gain Shipping Pte Ltd v Owner and/or Charterer of Demise of Vessel Dong Nai Registered at Haiphong Port, Vietnam (The Dong Nai)

HIGH COURT (JOHOR BAHRU) — ADMIRALTY IN REM NO 27-4-1995
ABDUL MALIK ISHAK J
14 NOVEMBER 1995

Civil Procedure *— Admiralty — Admiralty jurisdiction of the High Court — Whether plaintiffs had submitted to the admiralty jurisdiction of the High Court by obtaining the warrant of arrest from the High Court — Courts of Judicature Act 1964 s 24(b)*

Shipping and Navigation *— Action in rem — Arrest of vessel — Application to set aside writ of summons and warrant of arrest — Whether there was evidence to show that the claims were justified — Whether there were non-disclosure of facts by the plaintiffs — Effect of the non-disclosure of facts — Whether arrest was wrongful and made with malice — Whether defendants were entitled to damages*

The ship Dong Nai belonging to the defendants was arrested at Pasir Gudang Port, Johor Bahru at the instance of the plaintiffs through a warrant of arrest dated 4 October 1995. The plaintiffs claimed for the sums of US$42,500 and RM200,818 and/or an indemnity for the said amounts being the aggregate claims by the shippers and/or the consignors of the cargo for late delivery and the port charges and charges for the shore crane. To support their claim for US$42,500, the plaintiffs relied on a facsimile from China Ocean Shipping Agency, Fangcheng worded in the Chinese language. The defendants promptly entered a conditional appearance and filed a summons in chambers ('encl 14') supported by an affidavit for an order, inter alia, setting aside the writ of summons and the warrant of arrest on their ship. On the hearing date, the plaintiffs and their counsel were absent. However, there was evidence that showed that it was patently clear the plaintiffs knew that encl 14 was scheduled to be heard on 31 October 1995 but they chose to be absent. Therefore, the court proceeded with the hearing of encl 14.

Held, allowing the application to set aside the writ of summons and warrant of arrest:

(1) A fascimile worded in the Chinese language was relied upon by the plaintiffs and no translation to Bahasa Malaysia was attempted by them. Therefore, this must be construed adversely against the plaintiffs (see p 461E; *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 followed).

(2) The contents of the facsimile clearly showed that either China Ocean Shipping Agency, Fangcheng, who were agents nominated by the plaintiffs, or the shippers and/or the consignors themselves had made a claim against the defendants and not against the

plaintiffs. It followed, therefore, that since there was no claim made or would be made by the shippers and/or consignors against the plaintiffs for the sum of US$42,500 as alleged, then the plaintiffs were not entitled to claim that amount by way of an indemnity from the defendants. In fact, there was absolutely no tangible reason why a claim for the delay or late delivery of the cargo should be made by the shippers against the plaintiffs who were mere charterers of the ship Dong Nai. A legitimate claim of this nature should have been channelled by the shippers against the defendants as under the bill of lading a contractual nexus existed between the shippers and the defendants (see pp 461I, 462A–C).

(3) The plaintiffs had expressly agreed by fax to the defendants' suggestion that the shore crane charges be borne by the plaintiffs before the discharge port could be changed to Pasir Gudang. Further, another fax from the brokers who fixed the charter also bore testimony to the plaintiffs' willingness to bear the shore crane charges. The plaintiffs also sanctioned the appointment of Kudrat Agencies by the defendants to handle the procurement of necessary berthing and other port facilities. Therefore, on these evidence, the plaintiffs' claim by way of an indemnity against the defendants for shore crane charges must be struck off (see pp 462G–I, 463A, C).

(4) It was clear that the admiralty jurisdiction of the High Court stemmed from s 24(b) of Courts of Judicature Act 1964. There was no doubt that the court had jurisdiction to adjudicate the matter at hand. Therefore, when the plaintiffs obtained the warrant of arrest from the court, they had in law and in fact submitted to the admiralty jurisdiction of the court (see pp 463E–F, 464C; *The Loon Sheng* [1979] 2 MLJ 179, *Palka Utama Shipping Co Ltd v The Sri Melati (Owners) & Interested Parties* [1976] 1 MLJ 283, *The Fuji Hoshi Maru* [1981] 2 MLJ 333 and *Fraser and Neave (M) Sdn Bhd v Owners of Sinar Mas & Ors* [1982] 1 MLJ 279 followed).

(5) The plaintiffs' affidavit in support of the warrant of arrest contained material inaccuracies as to material facts. These non-disclosures of material facts must be held adversely against the plaintiffs and would entitle the defendants to have the warrant of arrest discharged. Hence, the arrest could not be validly maintained (see p 464D, 465B; *The Varna* [1993] 2 Lloyd's Rep 253 followed).

(6) An application to set aside the warrant of arrest meant that the defendants were alleging wrongful arrest and wrongful continuance of the arrest their ship. Therefore, the appropriate test to be applied was whether there was mala fides or crassa negligentia implying malice on the part of the plaintiffs. On the evidence tendered, the court found that malice had been established against the plaintiffs. Hence, the arrest of the Dong

Nai was in fact wrongful (see p 466A–D; *The Evangelismos* (1858) 12 Moo PC 352 and *The Euroexpress* [1988] 3 MLJ 367 followed). A

(7) As malice had been proved, the defendants were entitled to damages in respect of their reasonable and foreseeable costs and expenses of obtaining the ship's release from the wrongful arrest. Further, the defendants would be entitled to recover the B overheads, expenses thrown away by reason of the arrest of the Dong Nai, salaries of the crew, insurance and loss of profit in the use of the Dong Nai while it was under continued arrest. The costs incurred by the defendants would be borne by the plaintiffs (see p 466D–G; *The Victor* (1866) 167 ER 38, *The Glasgow* (1855) 166 ER 1065, *The Nautilus* (1856) SW 105 and *Aiden* C *Shipping Co Ltd v Interbulk; The Vimeria* [1986] 1 AC 965 followed).

Obiter:

If security had been provided to obtain the release of the ship from D arrest, the costs incurred in obtaining the security and the bank charges would be recoverable as damages (see p 466G; *The Borag* [1981] 1 WLR 274 followed).

[Bahasa Malaysia summary

E

Kapal Dong Nai kepunyaan defendan telah ditangkap di Pelabuhan Pasir Gudang, Johor Bahru di atas permohonan plaintif melalui satu waran penangkapan bertarikh 4 Oktober 1995. Plaintif menuntut sejumlah wang US$42,500 dan RM200,818 dan/atau satu tanggung rugi untuk jumlah tersebut yang merupakan tuntutan agregat oleh penghantar dan/atau pemberi konsain untuk penghantaran lewat dan F bayaran pelabuhan dan bayaran untuk kren darat. Untuk menyokong tuntutan mereka untuk US$42,500, plaintif bergantung kepada satu faksimile daripada China Ocean Shipping Agency, Fangcheng yang ditulis dalam bahasa Cina. Defendan dengan segera memasukkan kehadiran bersyarat dan memfailkan satu saman dalam kamar G ('lampiran 14') yang disokong oleh satu afidavit untuk satu perintah, antara lainnya, mengetepikan writ saman itu dan waran penangkapan kapal mereka. Pada tarikh pembicaraan, plaintif dan peguam mereka tidak hadir. Walau bagaimanapun, terdapat keterangan yang menunjukkan bahawa adalah amat jelas bahawa plaintif mengetahui bahawa lampiran 14 dijadualkan untuk pembicaraan pada 31 Oktober H 1995 tetapi mereka memilih untuk tidak hadir. Justeru itu, mahkamah meneruskan pembicaraan lampiran 14.

Diputuskan, membenarkan permohonan untuk mengetepikan writ saman dan waran penangkapan itu:

I

(1) Satu faksimile dalam bahasa Cina telah digunakan oleh plaintif dan tidak terdapat apa-apa percubaan oleh plaintif untuk menterjemahkannya ke Bahasa Malaysia. Maka, ini mesti ditafsirkan secara buruk terhadap plaintif (lihat ms 461E; *Sykt*

Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 diikut).

(2) Kandungan faksimile itu menunjukkan dengan jelas bahawa China Ocean Shipping Agency, Fangcheng, iaitu ejen yang dinamakan oleh plaintif, atau penghantar dan/atau pemberi konsain telah membuat tuntutan terhadap defendan dan bukannya plaintif. Berikutan dengan itu, oleh kerana tidak terdapat tuntutan yang dibuat atau akan dibuat oleh penghantar dan/atau pemberi konsain terhadap plaintif untuk jumlah US$42,500 seperti yang dikatakan, plaintif tidak berhak menuntut jumlah itu sebagai tanggung rugi daripada defendan. Pada hakikatnya, tidak terdapat apa-apa sebab yang boleh dilihat kenapa tuntutan untuk kelambatan atau kelewatan menghantar kargo itu patut dibuat oleh penghantar terhadap plaintif yang hanya merupakan pencarter kapal Dong Nai. Satu tuntutan yang sah sepatutnya dibuat oleh penghantar terhadap defendan terus kerana di dalam bil muatan terdapat nexus kontrak di antara penghantar dan defendan (lihat ms 461I, 462A–C).

(3) Plaintif telah secara nyata bersetuju melalui faksimile kepada saranan defendan bahawa bayaran kren darat ditanggung oleh plaintif sebelum pelabuhan pemunggahan kargo boleh ditukar ke Pasir Gudang. Tambahan lagi, satu lagi faksimile daripada broker yang mengatur carter itu juga memberi testimoni mengenai kesanggupan plaintif menanggung bayaran kren darat itu. Plaintif juga memberikan persetujuan mengenai perlantikkan Kudrat Agencies oleh defendan untuk mendapatkan tempat berlabuh yang diperlukan dan lain-lain kemudahan di pelabuhan itu. Maka, di atas keterangan ini, tuntutan plaintif untuk tanggung rugi terhadap defendan bagi bayaran kren darat mesti dibatalkan (lihat ms 462G–I, 463A, C).

(4) Ia adalah jelas bahawa bidang kuasa admiralti Mahkamah Tinggi timbul daripada s 24(b) Akta Mahkamah Kehakiman 1964. Tidak terdapat keraguan bahawa mahkamah mempunyai bidang kuasa untuk menghakimi hal sebegini. Maka, apabila plaintif memperolehi waran penangkapan daripada mahkamah, mengikut undang-undang dan fakta mereka telah berserah kepada bidang kuasa admiralti mahkamah (lihat ms 463E–F, 464C; *The Loon Sheng* [1979] 2 MLJ 179, *Palka Utama Shipping Co Ltd v The Sri Melati (Owners) & Interested Parties* [1976] 1 MLJ 283, *The Fuji Hoshi Maru* [1981] 2 MLJ 333 dan *Fraser and Neave (M) Sdn Bhd v Owners of Sinar Mas & Ors* [1982] 1 MLJ 279 diikut).

(5) Afidavit plaintif yang menyokong waran penangkapan itu mempunyai ketidaktepatan dalam fakta-fakta penting. Ketakdedahan fakta-fakta penting itu mesti diputuskan secara buruk terhadap plaintif dan membolehkan defendan mendapatkan pelepasan daripada waran penangkapan itu. Maka, penangkapan itu tidak boleh dikekalkan secara sah (lihat ms 464D, 465B; *The Varna* [1993] 2 Lloyd's Rep 253 diikut).

(6) Satu permohonan untuk mengetepikan waran penangkapan itu bermakna bahawa defendan mengatakan terdapat penangkapan yang salah dan juga sambungan penangkapan yang salah ke atas kapal mereka. Maka, ujian yang sesuai digunakan adalah sama ada terdapat mala fides atau crassa negligentia yang menandakan niat jahat pada belah plaintif. Di atas keterangan yang diberikan, mahkamah mendapati bahawa niat jahat telah dibuktikan terhadap plaintif. Justeru itu, penangkapan Dong Nai adalah sememangnya salah (lihat ms 466A–D; *The Evangelismos* (1858) 12 Moo PC 352 dan *The Euroexpress* [1988] 3 MLJ 367 diikut).

(7) Oleh kerana niat jahat telah dibuktikan, defendan berhak untuk mendapat ganti rugi untuk kos mereka yang munasabah dan boleh dijangkakan dan perbelanjaan untuk mendapatkan pelepasan kapal daripada pengangkapan yang salah itu. Tambahan pula, defendan juga berhak mendapatkan bayaran overhed, kos hangus disebabkan penangkapan Dong Nai itu, gaji anak kapal, insurans dan kehilangan keuntungan dalam penggunaan Dong Nai semasa ia ditahan. Kos yang dibelanjakan oleh defendan akan ditanggung oleh plaintif (lihat ms 466D–G; *The Victor* (1866) 167 ER 38, *The Glasgow* (1855) 166 ER 1065, *The Nautilus* (1856) SW 105 dan *Aiden Shipping Co Ltd v Interbulk; The Vimeria* [1986] 1 AC 965 diikut).

Obiter:

Jika cagaran telah diberikan untuk mendapatkan pelepasan kapal daripada penangkapan, kos yang dibelanjakan dalam mendapatkan cagaran itu dan bayaran bank boleh didapati sebagai ganti rugi (lihat ms 466G; *The Borag* [1981] 1 WLR 274 diikut).]

Notes

For a case on the admiralty jurisdiction of the High Court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 129.

For cases on action in rem in shipping and navigation, see 11 *Mallal's Digest* (4th Ed) paras 688–831; [1989] Mallal's Digest 1445; [1992] Mallal's Digest 1588–1594; [1993] Mallal's Digest 1235–1238; [1994] Mallal's Digest 2019–2032.

Cases referred to

Aiden Shipping Co Ltd v Interbulk; Vimeria; The [1986] 1 AC 965
Avro International, The [1988] 1 MLJ 147
Borag, The [1981] 1 WLR 274
Cheshire Witch, The (1864) 11 LT 350
Collingrove, The (1885) 10 PD 158
Euroexpress, The [1988] 3 MLJ 367
Evangelismos, The (1858) 12 Moo PC 352
Fraser and Neave (M) Sdn Bhd v Sinar Mas, Owners of & Ors [1982] 1 MLJ 279
Fuji Hoshi Maru, The [1981] 2 MLJ 333

Glasgow, The (1855) 166 ER 1065
Loon Sheng, The [1979] 2 MLJ 179
Margaret Jane, The (1869) 20 LT 1017
Nautilus, The (1856) SW 105
Palka Utama Shipping Co Ltd v Sri Melati (Owners) & Parties Interested, The [1976] 1 MLJ 283
Saqr Jubail, The (Lloyd's Maritime Law Newsletter, 14 March 1985)
Stevens v Midland Counties Railway Co (1854) 10 Exch 352
Strathnaver, The (1875) 1 App Cas 58
Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420
Varna, The [1993] 2 Lloyd's Rep 253
Victor, The (1866) 167 ER 38

Legislation referred to

Courts of Judicature Act 1964 s 24(b)
Supreme Court Act 1981 s 20(2) [UK]

Arun Krishnalingam (*Shearn Delamore & Co*) for the plaintiffs.
Jainil Bhandari (*Serina Abdul Samad* with him) (*KM Chye & Partners*) for the defendants.

Abdul Malik Ishak J: By a warrant of arrest dated 4 October 1995, the ship Dong Nai belonging to the defendants was arrested at Pasir Gudang Port, Johor Bahru at the instance of the plaintiffs. That warrant of arrest was grounded on the affidavit of Mr Arun Krishnalingam, an advocate and solicitor of the High Court of Malaya affirmed on 4 October 1995 (encl 2). In a nutshell, encl 2 adverted to the plaintiffs' claim for the sum of US$42,500 and RM200,818 and/or an indemnity for the said amounts being the aggregate claims by the shippers and/or the consignors of the cargo for late delivery and the port charges and charges for the shore crane arising as a result of the breach of the implied and/or express terms of the charterparty as contained in and evidenced by the two fixture notes dated 28 August 1995 and 4 August 1995 respectively.

Having been alerted of the warrant of arrest and execution thereof of their ship, the defendants promptly entered a conditional appearance and took positive steps by way of a summons in chambers (encl 14) supported by an affidavit of one Randy Chan Man Wo affirmed on 17 October 1995 (encl 13) to set aside not only the writ of summons but also the warrant of arrest. To digress, Lai Kew Chai J in *The Avro International* [1988] 1 MLJ 147 especially at p 149G right hand column spoke of the effect of entering an unconditional appearance in this way:

> The effect of entering an unconditional appearance is twofold: (1) it waives any irregularity of the writ or its service; and (2) the defendant is considered to have submitted to the jurisdiction of the court: see 1 *The White Book* (1979 Ed) para 12/1/3. A defendant who wishes to set aside the writ or its service for non-compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore file a conditional appearance.

Reverting back to the facts of the case, encl 14 was scheduled for hearing on 27 October 1995. However, before that date, Mr Arun Krishnalingam by way of a certificate of urgency (encl 15) sought for the hearing of his summons in chambers (encl 17) for an order to declare Messrs Shearn Delamore & Co no longer acting for the plaintiffs and that the costs of the application be payable by the plaintiffs to the defendants. Enclosure 17 was also fixed for hearing on 27 October 1995. The affidavit in support of encl 17 was affirmed by Mr Arun Krishnalingam on 24 October 1995 and there he deposed that, as an advocate and solicitor practising in the law firm of Messrs Shearn Delamore & Co, he tried to contact his client in order to receive further instructions and had sent faxes imploring one James Lam to return his calls. All these attempts were fruitless. In the circumstances, it was deposed that they had no choice but to withdraw as solicitors for the plaintiffs. I granted the prayers sought for in encl 17 and adjourned the hearing of encl 14 scheduled on that date to 31 October 1995.

On 31 October 1995, Mr Jainil Bhandari, assisted by Miss Serina Abdul Samad who acted for the defendants, implored this court to proceed with the hearing of encl 14 notwithstanding the absence of the plaintiffs or their counsel. Mr Jainil Bhandari drew my attention to encl 21 which contained an affidavit of service sworn by Mr Arun Krishnalingam himself where he adverted to two salient points:

(1) that he had personally, on 27 October 1995 at 4.15pm, served the sealed copy of the order of this court dated 27 October 1995 in regard to encl 17 on the plaintiffs at the plaintiffs' registered office at International Plaza, Suite No 03–9,10 Anson Road, Singapore; and

(2) soon thereafter he had, by fax dated 28 October 1995, informed the plaintiffs that this court had granted an order discharging Messrs Shearn Delamore & Co, as their solicitors and reiterated that a sealed copy of the court order had been served on the plaintiffs' registered office in Singapore on 27 October 1995 at 4.15pm. Consequently, it was mentioned in that fax that Messrs Shearn Delamore & Co, had ceased to be the plaintiffs' solicitors. The fax also relayed a message to the effect that the defendants' application to set aside the writ and the warrant of arrest was fixed for hearing on 31 October 1995 before the Johor Bahru, High Court No 2 and that the plaintiffs will have to attend court on that date by himself or through a newly appointed counsel, failing which the defendants may proceed with their application and obtain an order in terms of their application.

It is patently clear that the plaintiffs knew that encl 14 was scheduled to be heard on 31 October 1995 and on that date they chose to be absent. That was the attitude of the plaintiffs, a Singapore registered company.

In encl 14, the defendants applied for the following orders:

(1) a declaration that the issuance of the warrant of arrest entered (as per) No 27–4–1995 at the instance of the plaintiffs and the execution thereof against the defendants' vessel the Dong Nai is unlawful and/or wrongful;

(2) (a) that the writ of summons and all subsequent proceedings herein be set aside and the warrant of arrest entered (as per) No 27–4–1995 be forthwith discharged; or alternatively,

(b) that all further proceedings herein be stayed in favour of arbitration proceedings to be brought in Hong Kong, and the vessel Dong Nai now under arrest in these proceedings be forthwith released from arrest;

(3) that the plaintiffs do pay damages to be assessed and costs to be taxed for the wrongful arrest of the said vessel Dong Nai;

(4) that the costs of and incidental to this action and this application herein be taxed and paid by the plaintiffs to the defendants; and

(5) such further and other relief as the court deems fir be ordered.

Randy Chan Man Wo's affidavit in encl 13 contained details which should be explored.

It seemed that the plaintiffs purportedly commenced an action to arrest the Dong Nai for the recovery of certain sums of moneys purportedly incurred by them, namely:

(a) US$42,500 by way of an indemnity being the aggregate sums as claimed by the shippers and/or consignors for the alleged late delivery; and

(b) RM200,818 by way of an indemnity being the amounts of port charges and the charges for the shore crane.

In regard to US$42,500 the plaintiffs sought to rely on a facsimile from China Ocean Shipping Agency, Fangcheng addressed to the plaintiffs which bore the date of 3 October 1995. I hasten to add that the facsimile was worded in the Chinese language and no translation to Bahasa Malaysia was attempted and this must surely be construed adversely against the plaintiffs (see decision of Eusoff Chin CJ in the case of *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420).

Be that as it may, the defendants took steps to translate that facsimile from China Ocean Shipping Agency, Fangcheng in the English language (exh 'RCL') but I do not propose to reproduce that translation here except to say that there was an allegation that at the Pasir Gudang port there was undue delay in discharging the cargo and that the charterers have now made a formal claim from the shipowner in the sum of US$42,500 as damages for late delivery. There was a threat that all the necessary legal measures will be adopted to punish the shipowner, namely the defendants.

If the plaintiffs sought to base their case on the argument that China Ocean Shipping Agency, Fangcheng were the shippers or consignors of their cargo then they fell into an error. The bill of lading clearly described China Ocean Shipping Agency, Fangcheng as the plaintiffs' nominated agents. That bill of lading too was issued in respect of the entire shipment of the cargo and the shippers and/or consignors therein were described as Yu Feng Cement (Hong Kong) Co Ltd.

It is germane to note that no where in the facsimile from China Ocean Shipping Agency, Fangcheng as adverted to earlier was there an

assertion that the shippers and/or the consignors have made a claim or will make a claim against the plaintiffs, as alleged in the writ and in the affidavit of Mr Arun Krishnalingam in encl 2. On the contrary, the contents of the said facsimile clearly showed that either China Ocean Shipping Agency, Fangcheng or the shippers and/or the consignors themselves have made a claim against the defendants and not against the plaintiffs. It follows, therefore, and it is my judgment, that since there was no claim made or will be made by the shippers and/or consignors against the plaintiffs for the sum of US$42,500 as alleged, then the plaintiffs are not entitled to claim that amount by way of an indemnity from the defendants. In fact, there is absolutely no tangible reason why a claim for the delay or late delivery of the cargo should be made by the shippers against the plaintiffs who were mere charterers of the ship Dong Nai. A legitimate claim of this nature should be channelled by the shippers against the defendant shipowners, after all under the bill of lading a contractual nexus existed between the shippers and the defendant shipowners.

Now, in regard to the plaintiffs' claim for RM200,818 purportedly incurred by them for port charges and shore crane charges when the ship Dong Nai berthed at Pasir Gudang port, the plaintiffs have sought to ground these claims on the facsimile dated 30 September 1995 from Kontena Nasional Sdn Bhd. This point is clearly evident from the affidavit of Mr Arun Krishnalingam. Two things need to be highlighted in regard to this facsimile. Firstly, the said facsimile is not a claim bill or for that matter an indication of a claim; it is only an estimated disbursement account and it does not show in any way that the port disbursements have been or will be charged to the account of the plaintiffs. Secondly, and, this is quite apparent, the facsimile from Kontena Nasional Sdn Bhd was addressed to Silverline Navigation and not to the plaintiffs. Now, if one were to have sight of the terms of the charterparty entered between the parties as contained in and evidenced by the two fixture notes, one will detect that all the terms and conditions which were not expressly set out in the fixture notes were required to be in accordance with the Gencon Charterparty Form. Article 5(b) of the Gencon Charterparty Form provides an exculpatory clause to the defendants and it is worded thus: 'The cargo shall be ... taken from the holds and discharged by the charterers or their agents, free of any risk, liability and expense whatsoever to the owners.' Seen from this perspective, the plaintiffs have agreed at the outset to bear the costs of the shore cranes.

Under the terms of the fixture note dated 4 August 1995, a minimum of 4,500 metric tons of cement was scheduled to be discharged at Port Klang. But soon after the ship Dong Nai completed loading, the plaintiffs informed the defendants that the said cargo was to be discharged at Pasir Gudang, Johor Bahru and not at Port Klang as scheduled. The defendants acted prudently and informed the plaintiffs that this sudden change was unacceptable as the port authorities at Pasir Gudang would not allow the ship Dong Nai to use her own cranes to discharge the cargo and that shore cranes would have to be used instead. The defendants relayed the message to the plaintiffs to the effect that they were prepared to change the discharge port at Pasir Gudang provided the plaintiffs agreed to bear the

A shore crane charges. The plaintiffs responded and by fax dated 11 September 1995 expressly agreed to the defendants' suggestion and accordingly, the discharge port was changed to Pasir Gudang. Incidentally, another fax dated 11 September 1995 from Delta Hanoi, who were the brokers who fixed the charter, also bore testimony to the plaintiffs' willingness to bear the shore crane charges. On these evidences, the plaintiffs' claim by way of B an indemnity against the defendants for shore crane charges must consequently be thrown to the wind.

It was next argued by Mr Jainil Bhandari, learned counsel for the defendants, that the plaintiffs had failed to procure the necessary berthing and other port facilities required by the authorities to discharge the cargo C at Pasir Gudang port; this prompted the defendants to make their own arrangements to berth Dong Nai and discharge the cargo. Towards this end, the defendants employed their own agents, namely, Kudrat Agencies to handle those matters and the bills came to a staggering RM199,716. It must be pointed out that the appointment of Kudrat Agencies was with the D sanction of the plaintiffs as reflected in their fax to the defendants dated 30 September 1995. For these reasons, to say the least, it would be inconceivable for the plaintiffs to seek an indemnity for the port charges which were all along arranged by the defendants through Kudrat Agencies.

On the question of admiralty jurisdiction of the High Court, it is clear that that power stems from s 24(b) of the Courts of Judicature Act E 1964 which provides that the civil jurisdiction of the court shall include the same jurisdiction and authority in relation to matters of admiralty as is heard by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981 (see *Palka Utama Shipping Co Ltd v The Sri Melati (Owners) & Interested Parties* [1976] 1 MLJ 283; *The Fuji Hoshi* F *Maru* [1981] 2 MLJ 333; and *Fraser and Neave (M) Sdn Bhd v Owners of Sinar Mas & Ors* [1982] 1 MLJ 279) — especially s 20 thereof which, inter alia, provides that the admiralty jurisdiction of the court shall include the jurisdiction to hear and determine any of the questions as mentioned in s 20(2) which includes any claim for loss of or damage to goods carried in a ship and any claim arising out of any agreement relating to the carriage G of goods in a ship as envisaged in s 20(2)(g) and (h) thereof. In 1 *Mallal's Supreme Court Practice* (2nd Ed) by Chang Min Tat, former FCJ, especially at p 916 there is a passage that merits reproduction in verbatim. It is this:

> In the exercise of admiralty jurisdiction as well as the substantive law, there is no relevant difference between the law of Singapore and the law of England: H per Lord Diplock in delivering the majority judgment in *The 'Halcyon Isle'* [1980] 2 MLJ 217 (PC), on appeal from the Court of Appeal of Singapore at pp 217–218 and per Lord Salmon and Lord Scarman at p 226.
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> The same is true with regard to Malaysia.

In *The Loon Sheng* [1979] 2 MLJ 179, Gunn Chit Tuan J (as he then was) I spoke of jurisdiction in admiralty proceedings by correlating it to a ship which was liable to be arrested. This was how his Lordship fashioned his judgment at p 181:

> As regards jurisdiction, I was of the view that s 1 of the UK Administration of Justice Act 1956, which was referred to by counsel for the plaintiffs, merely

defines the admiralty jurisdiction of the High Court. That section, however, must be read in conjunction with s 3 of the said Act which prescribes the mode of exercise of admiralty jurisdiction, and as regards s 3(4) of the said Act I would, with respect, agree with the views of the Singapore Court of Appeal that for a ship to be liable to arrest it must be the ship in connection with which the claim made in the action arose, if at the time when the action was brought it was the property of the defendant to the action, the defendant being the person who would be liable on the claim in an action in personam and who was either the owner or charterer of or in possession or control of the ship at the time when the cause of action arose. Alternatively, a ship liable to arrest could be any other ship which, at the time when the action is brought, is the property of the person liable in personam and who, at the time when the cause of action arose, was either the owner or charterer of or in possession or in control of, the ship in connection with which the claim arose.

That this court has jurisdiction to adjudicate on the matter at hand is beyond doubt. When the plaintiffs obtained the warrant of arrest from this court, they have in law and in fact submitted to the admiralty jurisdiction of this court and no amount of quibbling can change that. So much for the jurisdiction part.

Next, Mr Jainil Bhandari argued that the affidavit of Mr Arun Krishnalingam in support of the warrant of arrest for the Dong Nai contained material inaccuracies as to the material facts and such non-disclosures would entitle the defendants to have the warrant of arrest discharged. Reliance was placed on *The Varna* [1993] 2 Lloyd's Rep 253 for this proposition. The defendants in *The Varna* applied to set aside the warrant of arrest on the grounds, inter alia, that the plaintiffs in their affidavit in support of the warrant of arrest had failed to disclose that there were already proceedings relating to the same matter before the courts in Bulgaria and that the defendants were in fact exercising a lien on the cargo pursuant to a Bulgarian court order granted on 3 December 1992. Consequently, the defendants contended that the plaintiffs' proceedings were an abuse of the process of the court and should be set aside. Scott LJ, in a long judgment, had this to say (at p 255 right hand column):

Each counsel addressed me on the footing that Robert Goff LJ's judgment established that the issue of a warrant of arrest was a discretionary remedy requiring, as on any ex parte application for a discretionary remedy, full disclosure by the applicants of all material facts. The issue between them was as to the scope of the 'material facts' that had to be disclosed. Mr Smouha contended that the plaintiffs' obligation of disclosure was not as extensive as, for example, on an ex parte application for a mareva injunction. The plaintiffs, he said, had a prima facie right to arrest in support of their in rem action. Mr Eder countered by reliance on the judgment in *The Vasso*, and Robert Goff LJ's dicta therein.

After alluding to the arguments of both parties, Scott LJ concluded the matter in the following way (at p 256 right hand column) :

At the conclusion of argument Rose LJ and I conferred. We were of the opinion that on the authority of *The Vasso* we were bound to hold that there had been in the present case non-disclosure of material facts, that accordingly the warrant of arrest had been rightly set aside by Curtis J and that the appeal should be dismissed.

For fear of repetition, Mr Jainil Bhandari highlighted the contents of the facsimile from China Ocean Shipping Agency, Fangcheng to drive home the point the obvious differences between the contents of that facsimile with the affidavit of Mr Arun Krishnalingam which would render the question of the indemnity of US$42,500 groundless. The same point was made in regard to the plaintiffs' claim for RM200,818 purportedly incurred by them for port charges which had been arranged by the defendants through Kudrat Agencies and the shore crane charges, which by virtue of Art 5(b) of the Gencon Charterparty Form, the plaintiffs have agreed to bear the costs of the shore cranes. These non-disclosures of material facts must be held adversely against the plaintiffs and, consequently, the warrant of arrest must be set aside. It is my judgment that where the affidavit leading to the warrant of arrest contains material inaccuracies, the arrest cannot be validly maintained.

An application to set aside the warrant of arrest of the ship Dong Nai must necessarily mean that the defendants are alleging wrongful arrest of their ship. That being the case, the onus would be on the defendants to prove:

(1) that the action in rem commenced against the ship had been terminated in the defendants' favour; or

(2) that there had been mala fides or crassa negligentia on the plaintiffs' part in effecting the arrest of the ship; here the defendants must show that the arrest of their ship was malicious (*The Collingrove* (1885) 10 PD 158); or

(3) that as a consequence of that wrongful arrest, the defendants incurred damages. Reference may be made to *The Strathnaver* (1875) 1 App Cas 58 where it was held that a person who, maliciously and without reasonable and probable cause, procures the arrest of a ship by admiralty proceedings is liable to pay damages to the person aggrieved.

In the context of the present case, I need to address my mind to numbers (2) and (3) only. Now, way back in 1858 in the case of *The Evangelismos* (1858) 12 Moo PC 352, the Privy Council laid down the principle that damages for wrongful arrest may be awarded only in case where there is either mala fides or crassa negligentia implying malice on the part of the arresting party. What constitutes mala fides or bad faith for an arrest of a ship has been outlined in *The Euroexpress* [1988] 3 MLJ 367 to mean that 'there must be some element in the arrester's conduct, for example, where the arrest is in relation to a malicious claim, or is of itself malicious, apart from the proper enforcement of his claim'. In *The Borag* [1981] 1 WLR 274, the English Court of Appeal held that there was mala fides on the part of the arresting party in effecting the initial arrest of the vessel. It must be pointed out that the conduct of the ship managers in *The Borag* in arranging for the vessel to proceed to the Port of Limassol where the vessel was arrested was held to be 'contrary to the letter and spirit' of the management agreement between the ship managers and the shipowners. In the context of the present case, when the Dong Nai was arrested at Pasir Gudang Port and remained arrested therein, then the appropriate test to be applied to

determine whether there is wrongful continuance of the arrest is the same as that applicable to wrongful arrest, namely, mala fides or crassa negligentia implying malice. There is a plethora of cases on this point. Suffice for me to quote a few of them, namely, *The Margaret Jane* (1869) 20 LT 1017; *The Cheshire Witch* (1864) 11 LT 350 and *The Saqr Jubail* as reported in the Lloyd's Maritime Law Newsletter of 14 March 1985. The word 'malice' according to Baron Alderson in *Stevens v Midland Counties Railway Co* (1854) 10 Exch 352 at p 356 ought to bear the same meaning as it bears in an action for malicious prosecution, namely, 'any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice'. When the plaintiffs successfully secured the arrest of the Dong Nai, they knew that they had to pay for the costs of the shore cranes; they also knew that they requested for the change of the discharge port at Pasir Gudang from Port Klang and, finally, they also knew that there was no claim made or will be made by the shippers and/or consignors against them for the sum of US$42,500. On this scenario, surely malice had been established against the plaintiffs.

It is my judgment from the facts as garnered from the affidavits that there was in fact wrongful arrest of the Dong Nai. It now remains for me to consider the question of damages. It has been said that on the authority of *The Borag*, the defendants here are entitled to damages in respect of their reasonable and foreseeable costs and expenses of obtaining the ship's release from the wrongful arrest. It would not be out of place to mention here that the defendants will be entitled to recover the overheads and expenses thrown away by reason of the arrest of Dong Nai and the attendant delay while the ship was held up at Pasir Gudang port and these expenses, I venture to say, must include the salaries of the crew, insurance, etc. It is also germane to mention here that the loss of profit in the use of the Dong Nai while it was under continued arrest at Pasir Gudang port will be recoverable as expenses consequent upon the initial wrongful arrest. Even Lord Denning MR in *The Borag* especially at p 281 was of the view that if the security had been provided to obtain the release of the ship from arrest, the costs incurred in obtaining the security and the bank charges will be recoverable as damages. Damages were awarded by the Courts in *The Victor* (1866) 167 ER 38; in *The Glasgow* (1855) 166 ER 1065; and in *The Nautilus* (1856) SW 105. In the last two of these cases, malice was proved and it became the foundation of the judgments there. The same is true here. Malice has been proved to the hilt. As regards costs incurred by the defendants, the plaintiffs will have to bear them (*Aiden Shipping Co Ltd v Interbulk; The Vimeria* [1986] 1 AC 965).

For the reason adumbrated above, I granted prayers (1), (2)(a), (3) and (4) of encl 14.

Order accordingly.

Reported by Hanim Kamaruddin